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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.P., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

A.P.,

Defendant and Appellant.

E071220

(Super.Ct.No. J276154)

OPINION

APPEAL from the Superior Court of San Bernardino County. Winston S. Keh,
Judge. Affirmed as modified.

Paul R. Kraus, under appointment by the Court of Appeal, for Defendant and
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Tami
Falkenstein Hennick, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

On April 20, 2018, in the County of Los Angeles, a petition under Welfare and Institutions Code section 602 alleged that defendant and appellant, A.P. (Minor; a girl, born June 2002), committed one count of misdemeanor shoplifting under Penal Code section 459.5. On May 10, 2018, Minor admitted the charge. The juvenile court denied her release pending disposition and ordered her transferred to San Bernardino County.

On June 15, 2018, at the dispositional hearing in San Bernardino County, the juvenile court adjudged Minor a ward of the court under Welfare and Institutions Code section 602, placed Minor on probation, and returned her to the custody of her mother.

On August 1, 2018, the San Bernardino District Attorney filed a petition alleging that Minor had violated her probation by (1) testing positive for marijuana and methamphetamine on July 2, 2018; (2) failing to report for a scheduled visit with probation on July 3, 2018; (3) running away from home on July 21, 2018; and (4) failing to attend a counseling program session on July 23, 2018.

On August 16, 2018, the Los Angeles District Attorney filed a petition charging Minor with: (1) felony driving or taking a motor vehicle without the owner's consent under Vehicle Code section 10851, subdivision (a); (2) driving without a license under Vehicle Code section 12500, subdivision (a); (3) giving false information to a police officer under Penal Code section 148.9, subdivision (a); and (4) resisting a peace officer under Penal Code section 148, subdivision (a)(1). The next day, on August 17, 2018, Minor admitted the charge of driving or taking a vehicle without the consent of the

owner. The court dismissed the remaining counts and ordered Minor transferred back to San Bernardino County.

On August 24, 2018, in San Bernardino, Minor admitted violating probation by running away from home on July 12, 2018; the court dismissed the remaining allegations. Thereafter, the court continued Minor as a ward and imposed additional probation conditions, including probation condition No. 24, an electronic search condition, over Minor's objection.

On September 4, 2018, Minor filed a timely notice of appeal.

B. FACTUAL HISTORY

On April 18, 2018, Minor was at a Target store in Inglewood. Through video surveillance, a loss prevention officer observed Minor taking several boxes of pain medication from the display counters and placing them in a large bag. The loss prevention officer continued to watch Minor as she walked past the cash registers and out of the store without paying for the items. He detained Minor shortly after she left the store. Police arrived; Minor was arrested and placed in detention.

On July 23, 2018, Minor's mother reported that two days earlier, Minor took mother's car and left the home without permission.

Two days later, on July 25, 2018, the Anaheim Police Department contacted mother. The department told mother that they had recovered her car with an unknown person driving it; Minor was not in the car. As of that time, Minor had not been home since July 21, and her whereabouts were unknown.

On August 14, 2018, during a traffic stop in Los Angeles, police officers found Minor in the passenger seat of a stolen vehicle. Minor told the officers that she had purchased the car on the Internet. Officers arrested and detained Minor.

DISCUSSION

Probation condition No. 24, imposed by the juvenile court, states: “Submit to an electronic search at the direction of any law enforcement officer.” On appeal, Minor contends that the electronic search condition is unreasonable under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*),¹ and that it is unconstitutionally overbroad. We agree the condition must be stricken under *Lent*, and do not reach the constitutional question.

“The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions.” (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) Penal Code section 1203.1 authorizes a sentencing court to impose “reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer.” (Pen Code, § 1203.1, subd. (j).)

A juvenile court may impose on a minor on probation “any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done

¹ The California Supreme Court has granted review to resolve this issue in *In re Ricardo P.*, review granted February 17, 2016 (S230923), and *In re Patrick F.*, review granted February 17, 2016 (S131428).

and the reformation and rehabilitation of the ward enhanced.” (Welf. & Inst. Code, § 730, subd. (b).) “A juvenile court enjoys broad discretion to fashion conditions of probation for the purpose of rehabilitation and may even impose a condition of probation that would be unconstitutional or otherwise improper so long as it is tailored to specifically meet the needs of the juvenile.” (*In re Josh W.* (1997) 55 Cal.App.4th 1, 5; *In re Sheena K.* (2007) 40 Cal.4th 875, 889.)

In *Lent, supra*, 15 Cal.3d 481, the California Supreme Court articulated the following test to determine whether a probation condition constitutes an abuse of discretion: “A condition of probation will not be held invalid unless it ‘(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality.’ ” (*Lent, supra*, 15 Cal.3d at p. 486.) “This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term.” (*People v. Olguin* (2008) 45 Cal.4th 375, 379 (*Olguin*).) “As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to preventing future criminality.” (*Id.* at pp. 379-380.) The *Lent* test applies to juvenile probation conditions. (*In re P.O.* (2016) 246 Cal.App.4th 288, 294; *In re D.G.* (2010) 187 Cal.App.4th 47, 52.)

In this case, the first two prongs under *Lent* are clearly met. Neither party argues that the electronic search condition relates to Minor’s offenses. Minor admitted to misdemeanor shoplifting, running away from home, and taking her mother’s car without

permission. None of these offenses involved her use of a cell phone or any other electronic device. In fact, there is no evidence in the record that Minor possessed a cell phone or other electronic devices. Moreover, there is nothing in Minor's past or current offense or personal history that connects her use of electronic devices with criminal activity. Additionally, Minor's use of electronic devices is not in itself criminal.

Therefore, the issue on appeal is whether the third criterion under *Lent* is met: Whether the electronic search condition is reasonably related to Minor's future criminality. We are aware that "[t]he permissible scope of discretion in formulating terms of juvenile probation is even greater than that allowed for adults." (*In re Victor L.* (2010) 182 Cal.App.4th 902, 910.) " 'The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents' [citation], thereby occupying a 'unique role . . . in caring for the minor's well-being.' [Citation.] In keeping with this role, [Penal Code] section 730, subdivision (b), provides that the court may impose 'any and all reasonable [probation] conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' " (*Id.* at pp. 909-910.) " '[E]ven where there is an invasion of protected freedoms "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." ' [Citation.] This is because juveniles are deemed to be 'more in need of guidance and supervision than adults, and because a minor's constitutional rights are more circumscribed.' [Citation.] Thus, ' "a condition of probation that would be unconstitutional or otherwise improper for an adult probationer may be permissible for a minor under the supervision of the juvenile court." ' " (*Id.* at p. 910.)

Still, every probation condition must be made to fit the circumstances and the minor. (*In re Binh L.* (1992) 5 Cal.App.4th 194, 203.) Unlike an adult probationer, a juvenile “ “ “cannot refuse probation [citations] and therefore is in no position to refuse a particular condition of probation.” [Citation.] Courts have recognized that a “minor cannot be made subject to an automatic search condition; instead, such condition must be tailored to fit the circumstances of the case and the minor.” ’ ’ ” (*In re J.B.* (2015) 242 Cal.App.4th 749, 756 (*J.B.*), quoting *In re Erica R.* (2015) 240 Cal.App.4th 907, 914 (*Erica R.*)). Because of the immense amount of personal information that can be stored on electronic devices, and even greater amounts to be found on Internet sites the devices can access, electronic search conditions carry obvious implications for constitutionally protected privacy interests. (See generally *Riley v. California* (2014) 573 U.S. 373, 493.) In California, the published cases have reached conflicting conclusions about their reasonableness. The issue is currently pending Supreme Court review, as noted *ante*.

In *Erica R.*, *supra*, 240 Cal.App.4th at page 910, the court considered a probation condition requiring a minor who had admitted misdemeanor possession of ecstasy to submit to a search of her “electronics” and provide her passwords to her probation officer. The offense did not involve use of any electronic devices, and the minor’s attorney represented that the minor did not have a cell phone. (*Ibid.*) The juvenile court believed the condition was reasonably related to future criminality because it provided a way to keep track of the minor’s drug usage, explaining that in its experience, “ “many juveniles, many minors, who are involved in drugs tend to post information about themselves and drug usage.”” (*Id.* at pp. 910, 913.) After finding the first two *Lent*

factors were met because the condition had no relationship to the minor's offense, and typical use of electronic devices and social media is not criminal, the appellate court rejected the juvenile court's justification: " '[B]ecause there is nothing in [Erica's] past or current offenses or [her] personal history that demonstrates a predisposition' to utilize electronic devices or social media in connection with criminal activity, 'there is no reason to believe the current restriction will serve the rehabilitative function of precluding [Erica] from any future criminal acts.' " (*Erica R.*, at pp. 912-913, quoting *In re D.G.*, *supra*, 187 Cal.App.4th at p. 53.)

The appellate court in *Erica R.* distinguished that case from *People v. Ebertowski* (2014) 228 Cal.App.4th 1170 (*Ebertowski*), wherein the adult defendant was convicted of making criminal threats to a police officer. There, the condition requiring the defendant to submit his electronic devices to search, with passwords to the devices and social media accounts, was reasonably related to the risk of future criminality because the threats had included references to the defendant's gang membership; he had promoted his gang through his social media account; and his gang membership was related to future criminality in that his " 'association with his gang gave him the bravado to threaten and resist armed police officers.' " (*Erica R.*, *supra*, 240 Cal.App.4th at pp. 914-915, quoting *Ebertowski*, at pp. 1173, 1176-1177.)

In *J.B.*, *supra*, 242 Cal.App.4th 749, in a case involving a minor who admitted committing a petty theft, the court reached the same result as *Erica R.* An electronic search was imposed by the same juvenile court judge as in *Erica R.*, for the same reason. (*J.B.*, *supra*, 242 at p. 752.) The *J.B.* court found there was "no showing of any

connection between the minor’s use of electronic devices and his past or potential future criminal activity,” and therefore no reason to believe the condition would serve the purpose of preventing the minor from committing future criminal acts. (*Id.* at pp. 756-757.) *J.B.* disagreed with the reasoning of two of the cases currently pending Supreme Court review, both of which also involved electronics search conditions imposed by the same juvenile court judge as a means to supervise minors for whom there was some indication of illegal drug use in the record. (*Id.* at p. 757, discussing *In re Ricardo P.*, *supra*, 241 Cal.App.4th 767, and *In re Patrick F.*, *supra*, 242 Cal.App.4th 104.) Those cases were based on *Olguin*, which upheld a condition of probation that had no relationship to the defendant’s offense but would “enable[] a probation officer to supervise his or her charges effectively.” (*Olguin*, *supra*, 45 Cal.4th at pp. 380-381.) The condition in *Olguin* required the adult defendant to keep his probation officer informed of the presence of pets at his residence. (*Id.* at p. 381.) The court explained that this requirement would facilitate unannounced visits to and searches of a probationer’s residence, which are part of “proper supervision” of a probationer, by enabling the probation officer to take precautions against possible threats posed by an animal, as well as avoid having a pet create an opportunity for destruction of evidence of unlawful activity by alerting the probationer to the officer’s approach. (*Id.* at pp. 381-382.) “By allowing close supervision of probationers, probation search conditions serve to promote rehabilitation and reduce recidivism while helping to protect the community from potential harm by probationers.” (*People v. Robles* (2000) 23 Cal.4th 789, 795.) “ ‘A

condition of probation that enables a probation officer to supervise his or her charges effectively is, therefore, ‘reasonably related to future criminality.’ ’ ’ (*Olguin*, at p. 388.)

J.B. questioned whether *Olguin* “justifies a probation condition that facilitates general supervision of a ward’s activities if the condition requires or forbids noncriminal conduct bearing no relation to the minor’s offense that is not reasonably related to potential future criminality as demonstrated by the minor’s history and prior misconduct.” (*J.B.*, *supra*, 242 Cal.App.4th at p. 757.) The court concluded that “such a broad condition cannot be squared with the limitations imposed by *Lent* . . . , and in some cases may exceed constitutional limitations. (See [*Sheena K.*, *supra*,] 40 Cal.4th [at p.] 890.)” (*Ibid.*) We agree that “ ‘[n]ot every probation condition bearing a remote, attenuated, tangential, or diaphanous connection to future criminal conduct can be considered reasonable.’ ” (*Erica R.*, *supra*, 240 Cal.App.4th at p. 913, quoting *People v. Brandao* (2012) 210 Cal.App.4th 568, 574.) “The fact that a search condition would facilitate general oversight of the individual’s activities is insufficient to justify an open-ended search condition permitting review of all information contained or accessible on the minor’s smart phone or other electronic devices.” (*J.B.*, at p. 758.)

Moreover, the *Olguin* court made a point of explaining that the particular condition at issue—requiring a probationer to keep the probation officer informed of the presence of pets—was both a reasonable means of facilitating the general search condition and reasonable in that it did not impose an undue burden on the probationer. (*Olguin*, *supra*, 45 Cal.4th at p. 382.) *Olguin* did not hold that *every* condition that could enable a probation officer to supervise a minor more effectively is necessarily

“reasonably related to future criminality.” (*Id.* at p. 381.) An electronic search condition that requires a minor to provide access to the wide range of data potentially stored on electronic devices imposes a burden vastly different in nature and extent from what was at issue in *Olguin*. Unlike the condition in *Olguin*, which only facilitated a residence-search condition the defendant did not challenge, probation condition No. 24, here, adds significantly to the scope of the areas subject to warrantless search. As the court observed in *Riley, supra*, 573 U.S. at pp. 396-397, “a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.” As with adult probationers, a search condition diminishes but does not altogether foreclose a juvenile probationer’s reasonable expectation of privacy. (*In re Jaime P.* (2006) 40 Cal.4th 128, 136.)

In *Erica R., supra*, 240 Cal.App.4th at p. 914, the court recognized that “there can be cases where, based on a defendant’s history and circumstances, an electronic search condition bears a reasonable connection to the risk of future criminality.” In *Ebertowski, supra*, 228 Cal.App.4th 1170, an electronic search condition was reasonable because the defendant’s use of his social media account directly related to his criminal offense. In *In re Malik J.* (2015) 240 Cal.App.4th 896, the court held that an electronic search condition requiring a minor to provide passwords to devices in his custody and control was reasonably related to his offenses, which included a robbery involving an iPhone, as the

condition would enable officers to determine the ownership of electronic devices found in the minor's possession. (*Id.* at p. 902.)

Even where the underlying offense is not directly tied to use of electronic devices, a minor's history and overall circumstances may be such that an electronic search condition is reasonably related to future criminality. But if there is nothing in a minor's current offenses, criminal history or personal circumstances demonstrating a predisposition to use electronic devices in connection with criminal activity, there is no basis for concluding an electronic search condition “ ‘will serve the rehabilitative function of precluding [Erica] from any future criminal acts.’ ” (*Erica R.*, *supra*, 240 Cal.App.4th at p. 913, quoting *In re D.G.*, *supra*, 187 Cal.App.4th at p. 53.) The condition must be reasonably related to future criminality in that it would be a reasonable means of deterring future crime by this particular minor, based on all the circumstances of this particular case.

In this case, the juvenile court concluded that the electronics search condition would help prevent future criminality. It stated: “Given that [Minor] has gang ties, given that she has not taken anything seriously, specifically the offenses that brought her to this court, I think this term is reasonable. And I'm exercising my discretion. I'm going to impose it. The objection is overruled.” On appeal, the People argue that electronic devices could have been used by Minor or could be used in the future by Minor to commit offenses. However, the People concede that “the record does not contain specific evidence that the minor contacted associates or gang members or noted use of illegal substances through social media or her electronic devices.” Just as in *Erica R.*, there was

nothing in Minor’s underlying offenses or her probation violations related to the use of electronic devices. Moreover, there was nothing in the history reflected in the probation reports suggesting Minor’s underlying offenses related to electronic devices or use of electronic devices for any unlawful purpose or to facilitate or promote unlawful conduct. Hence, just as in *Erica R.*, probation condition No. 24 is not reasonably related to future criminality. (Accord, *People v. Bryant* (2017) 10 Cal.App.5th 396, 404-406, review granted June 28, 2017, S241937.) Accordingly, we find that the electronic search condition is invalid under *Lent*, and therefore an abuse of the juvenile court’s discretion. Because we find that the probation condition is invalid under *Lent*, we need not address Minor’s argument that the condition is overbroad.

DISPOSITION

The disposition order is modified to strike probation condition No. 24 that Minor “[s]ubmit to an electronic search at the direction of any law enforcement officer.” In all other respects, the order is affirmed.

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MILLER

Acting P. J.

We concur:

FIELDS

J.

RAPHAEL

J.